No. 4026

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

DE MARTINI MOTOR TRUCK COMPANY,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE

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STATEMENT.

This is an appeal from the order of the United States District Court for the Northern District of California refusing to grant the petition of appellant for certain relief made in a criminal case entitled *United States vs. Capacioli.* There is also pending here appeals in two other cases, to wit, *Oakland Motor Car Company vs. United States of America,* No. 4025, and *Howard Automobile Company vs. United States of America,* No. 4027. The

three appeals apparently relate to similar situations and are presented on printed Transcripts of Record in the same form. Briefs for appellant have been filed only in the case of *De Martini vs. United States,* No. 4026; at lease no brief in any of the two remaining cases has been served upon appellee.

The record presented here is very meager. There is presented the affidavit of One Guido Braccini, to which is attached as a single paragraph the petition of De Martini Motor Truck Company for the return of a truck. The affidavit shows that on Decembe 4, 1920, the Truck Company sold to one Guisseppie Capacioli a certain motor truck. The agreement of sale was in the form of a conditional sales contract, a photostat copy of which appears in the Record attached to the affidavit, and from which it appears that the conditional sales contract was substantially similar to the contract set forth in the case of *H. O. Harrison Company vs. United States,* No. 4065. Under the contract the purchase price was to be paid in installments and the title reserved in the vendor until the full purchase price was paid. The affidavit further states that of the purchase price a specified sum was unpaid. It is further set forth that in October, 1922, Capacioli was arrested and the truck seized for the unlawful transportation of intoxicating liquor in violation of the "National Prohibition Act," and that the truck was then in possession of the United States Prohibition Officer. The affidavit finally contains the statement:

> "*Affiant* further states that at the time said 2-ton truck was entrusted to the care and custody of Guiseppe Capacioli, defendant herein, this *affiant* had no knowledge or information nor has said *affiant* had any notice or information or suspected that said Guiseppe Capacioli since said time intended to use or was using said 2-ton truck in unlawfully transporting intoxicating liquor."

The so-called petition does not set forth any additional facts. It consists of merely a prayer that the truck be surrendered to petitioner, or, if sold in the manner provided by law, that the amount due petitioner be paid from the moneys realized. The petition and affidavit was filed December 27, 1922. The Government answered, setting forth that for want of knowledge it denies that the petitioner had no knowledge or information or suspicion that the defendant in the above entitled action did not intend to use, or had used, or was using said truck in the unlawful transportation of intoxicating liquor. The answer referred to the affidavit of the Prohibition Agent which was attached and made a part thereof. The affidavit of the Prohibition Agent set forth that on October 6, 1922, such Agent, at San Francisco, found Capacioli with three other persons transporting seven barrels of red wine on the truck in question; whereupon the Agent arrested Capacioli and the others and seized the truck, and that the truck and wine were then, January 27, 1923, in the possession of the Federal Prohibition Director. Capa-

cioli stated to the Agent that the wine belonged to him and that he had hired the truck from one of the other defendants then present. The latter answer and affidavit was filed February 9, 1923. The printed Transcript of Record does not show in any way what was done with respect to the hearing of the petition and answer. There is no Bill of Exceptions or similar document in the Transcript. It does not appear that any or all of the facts set forth in either affidavit was admitted or proven, nor does it contain any testimony as given upon any hearing of the said petition. The next document printed in the Record consists of the Opinion of the Judge denying motions in four several criminal cases of which the case under review was one. The closing paragraph of the Opinion being "the motion, therefore, in each case will be denied." Whether orders denying the motion were after entered is not apparent. It will be observed from the printed Transcript that the record here fails to show what was done in the court below.

ARGUMENT.

A. THERE IS NO RECORD BEFORE THE COURT FROM WHICH IT CAN BE ABLE TO SAY THAT THE ACTION OF THE LOWER COURT WAS ERRONEOUS OR EVEN TO ENABLE THE COURT TO UNDERSTAND WHAT WAS IN FACT DONE.

We deem it sufficient merely to point out to the court that there is no sufficient record here to enable this court to determine whether the court below erred or not in refusing the application of appellent. Normally this should be done by a Bill of Exceptions bringing up such evidence as may have been produced in aid of the application and showing the proceedings that transpired when the court heard the application. Such a Bill of Exceptions has been brought up in the H. O. Harrison Co. case above referred to, and we deem it the proper method, but, if any other similar method could be availed of it has not been adopted. It cannot be said that the matter was heard upon the affidavit of petitioner and his petition and the answering affidavit thereto, nor can the court say that there was any agreement as to the facts made below, or that any testimony was introduced proving the averments either of the petition or affidavit of petitioner, for the reason that the proceedings have not been shown in any Bill of Exceptions or other equivalent document, nor can this court assume that the facts in this case are the same as the facts set forth in the affidavit of

Braccini appearing in the record. That affidavit was a mere pleading or petition to enable petitioner to present his case in court, and, moreover, it was denied in material portions by the answer of the Government. But if a witness had appeared who testified to the same things that appear in the affidavit, it would still have been insufficient to show good cause to prevent a sale of the car or to enable petitioner to participate in the proceeds as a lienor. For it will be noted that while the De Martini Motor Truck Company was a corporation and presumably having a president and a certain number of directors, who would know best of its affairs, there was no affidavit presented by either the president or any of the directors showing or tending to show that the *petitioner* had no knowledge, or information or suspicion that Capacioli intended to use or was using the truck in unlawfully transporting liquor. The qualifying affidavit in that behalf was made by a mere sales manager, not apparently a general officer, and so far from showing that petitioner had no guilty knowledge, it merely set forth that *affiant,* being such subordinate employe, had no such knowledge or information; manifestly something very different from proving that *petitioner* did not have such knowledge or that some of its principal officers did not have such knowledge. For aught appears, Capacioli himself or some of the three remaining defendants in the case might have been connected with the Company and officers thereof. The qualifying affidavit, if taken literally, as the proof at the

hearing, would have been wholly insufficient. But this court cannot see from anything in the record that the court had not ample showing before it to induce it to refuse to return the truck, or that there was not such a case made as to convince it that there was good cause to the contrary against ordering a sale of the truck, or to show that petitioner was a lienor entitled to the proceeds of the sale.

B. PETITIONER WAS NOT ENTITLED TO RELIEF IN ANY EVENT.

If we may gather from the course of the argument here that petitioner, being a conditional sales vendor, claims to be entitled as a *lienor* and upon the showing to be made by a *lienor* to participate in the proceeds of the sale, then we answer that in no proper view of the case would petitioner be such lienor. The title was to be reserved to petitioner until fully paid and a form of contract was adopted which effectually prevented any theory of a lien being reserved. The remedy contracted for by petitioner did not require it either to foreclose a lien or sell the property; it had the right of recapture whenever the vendee failed to comply. Upon no theory was petitioner, being a conditional sales vendor, a lienor and thus entitled to recover a portion of the proceeds of sale upon the showing required to be made by a mere lienor.

If we may guess, and under the record it would be a mere speculation, that petitioner adopting the theory that under its contract it was entitled to

reclaim the car from the vendee for condition broken and that, therefore, it sought to have the car returned to it in advance of the trial of the defendant, we answer that the statute regulating the matter does not authorize the return of a car in any event until the trial, unless the third party shall execute a bond to redeliver the car at the trial.

See Section 26 of Title II of the *"National Prohibition Act."*

It would rather appear from the applicant's petition that the petition was filed in advance of the trial or conviction of the defendant Capacioli, although possibly denied after such conviction. In fact, there is nothing in the record to show whether Capacioli has been tried or convicted except a statement in the Judge's Opinion. But the opinion of the trial court constitutes no part of the record.

If petitioner applied after the conviction to show good cause as against the sale of the car, then it was required to assume the laboring car and undertake the burden of showing such good cause. If it merely filed a petition and thereafter failed to pursue the matter or appear at the hearing of such petition, we submit that it is manifest that there would be utter failure to show such good cause, nor could it be said that the action of the court in denying its application was erroneous.

We are entirely satisfied that the action of the court in the instant case was proper, but whether

proper or erroneous, there is no such record on the instant appeal as to justify the court in giving that matter any attention.

We submit that the order in the instant case, as well as the order in the other two cases referred to, and as to which we ask that this brief be taken as the brief of appellee, be affirmed.

Respectfully submitted,

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